

Service Date: Sept. 9, 1992

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

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| IN THE MATTER Of the Petition of |) | UTILITY DIVISION |
| Billings Generation, Inc. to |) | |
| Determine Conditions Under a Power |) | DOCKET NO. 92.8.39 |
| Purchase Agreement with Montana |) | ORDER NO. 5648 |
| Power Company. |) | |

ORDER ON MOTION TO DISMISS
INTRODUCTION

1. On August 4, 1992 Billings Generation, Inc. (BGI), pursuant to Secs. 69-3-603 - 604, MCA, filed a petition with the Montana Public Service Commission (Commission) to resolve a dispute between BGI and the Montana Power Company (MPC) over the interpretation of a power purchase agreement. MPC filed a answer to the petition on August 31, 1992. It is not disputed that BGI, a qualifying facility (QF) under federal and state law, has executed a power purchase agreement (Agreement) with MPC, a public utility. Petition of BGI, Pars. 2-3, Answer of MPC, Pars. 2-3.

2. On August 26, 1992 MPC filed a motion to dismiss the petition of BGI "on the grounds ... that the ... Commission does not have jurisdiction to interpret or adjudicate the terms of the ... Agreement between MPC and BGI" MPC asserts in its motion that "[t]here exists no statutory authority authorizing the Commission to interpret the Agreement because the interpretation will not affect rates or conditions of service." MPC filed a brief in support of its motion and BGI has filed a brief in opposition to the motion.

BACKGROUND TO THE ISSUE

3. This is the third recent petition filed with the Commission pursuant to 69-3-603 - 604, MCA. On August 28, 1990, MPC and BGI filed a joint petition asking the Commission to determine the rates and conditions of a proposed (unexecuted) power purchase agreement. MPC and BGI were able to agree to a

price (rates) for the proposed purchase, but were unable to agree to a certain condition in the proposed agreement. Even though there was no dispute over rates, the parties asked the Commission to determine the reasonableness of the rates so "that sufficient assurance of ratemaking pass through of purchase costs over the thirty-five years of the contract will be provided to allow financing of the project and MPC shareholders will be provided with necessary protection." Petition, In the Matter of the Petition of [MPC] and [BGI] to Determine the Rates and Conditions of a Power Purchase Agreement Between the Parties, Docket No. 90.8.51, p. 4, par. 13. In its brief in support of the joint petition MPC argued strenuously that the Commission was required to exercise jurisdiction over the disputed terms of the proposed agreement and to determine the rates. MPC's Brief in Support of Petition, pp. 1-4, August 27, 1990, Docket No. 90.8.51. The Commission agreed to determine both the disputed condition and the undisputed rates. Order No. 5506a, Docket No. 90.8.51, par. 7.

4. On April 11, 1991, Colstrip Energy Limited Partnership (CELP) filed a petition with the Commission to determine certain conditions of an executed power purchase agreement between CELP and MPC. CELP v. MPC, Docket No. 91.4.15. Because the Commission was unsure of its jurisdiction to interpret a fully negotiated and executed contract it asked the parties to brief "1) whether 69-3-603, MCA, requires that the Commission interpret fully executed contracts ..., or 2) whether the Commission's obligation under 69-3-603, MCA, is limited to determining the rates and contract conditions when parties are unable to reach agreement." Notice of Petition and Statement of Procedure, May 21, 1991, Docket No. 91.4.15. Both MPC and CELP argued that the Commission had jurisdiction to determine the dispute pursuant to 69-3-603, MCA. Initial Brief of CELP, June 14, 1991, Docket No. 91.4.15; MPC's Statement of Jurisdiction, June 14, 1991, Docket No. 91.4.15. Largely based on the arguments of MPC and CELP the Commission concluded that it had jurisdiction to determine disputed rates and conditions in executed power purchase agreements between QFs and public utilities. Order No. 5564a, Docket No. 91.4.15, August 9, 1991, adopting Order No. 5564, • 6.

5. Despite the fact that in the two previous petitions described above MPC argued that the Commission had jurisdiction, it argues that the Commission does not have jurisdiction over the instant case. BGI responds that the Commission has jurisdiction over the current dispute, just as it had jurisdiction over the dispute between CELP and MPC.

DISCUSSION

6. The Commission does not desire to assert jurisdiction where it has none. The Commission must, however, exercise those functions required of it by the legislature. The question, therefore, is whether the legislature has given the Commission the power and obligation to interpret the disputed Agreement at the request of BGI.

7. MPC reminds the Commission of the following language from Montana Power Company v. Public Service Commission, 206 Mont. 359, 371 (emphasis in original): "[The Commission] has only limited powers, to be ascertained by reference to the statute creating it and any reasonable doubt as to the grant of a particular power will be resolved against the existence of the power." BGI has petitioned the Commission, pursuant to 69-3-603 - 604, MCA, to resolve a contractual dispute. The Commission knows of no other statute(s), reasonable implications from statutory authority, nor case law that could form the basis of Commission jurisdiction over this matter. Therefore, if the Commission does have jurisdiction it is found in Secs. 69-3-603 - 604, MCA.

8. The determinative statute is Sec. 69-3-603, MCA, which reads as follows:

69-3-603. Required sale of electricity under rates and conditions prescribed by commission. (1) If a qualifying small power production facility and a utility are unable to mutually agree to a contract for the sale of electricity or a price for the electricity to be purchased by the utility, the commission shall require the utility to purchase the electricity under rates and conditions established under the provisions of subsection (2).

(2) The Commission shall determine the rates and conditions of the contract upon

petition of a qualifying small power production facility or a utility or during a rate proceeding involving the review of rates paid by a utility for electricity purchased from a qualifying small power production facility. The commission shall render a decision within 120 days of receipt of the petition or before the completion of the rate proceeding. The rates and conditions of the determination shall be made according to the standards prescribed in 69-3-604.

MPC argues that Sec. 69-3-603(1), MCA, does not give the Commission jurisdiction in this case because the parties have an executed contract. The Commission agrees. See Order No. 5564a, Docket No. 91.4.15, adopting Order No. 5564, • 6.

9. MPC also argues that Sec. 69-3-603(2), MCA, does not give the Commission jurisdiction because "it does not provide authority to interpret contract provisions not involving rates and conditions." MPC brief, p. 6. MPC distinguishes this case from CELP v. MPC, which MPC characterizes as a petition to determine rates and "condition(s) of service;" Id. at 7. MPC argues that this case does not present the Commission with a determination of rates or "conditions of service." MPC contends that it acceded to jurisdiction in CELP v. MPC because that case involved a rate dispute.

10. The Commission disagrees with MPC's assessment of CELP v. MPC and its apparent interpretation of Sec. 69-3-603(2), MCA. CELP v. MPC did not involve a rate dispute. In the opening paragraph of its petition in that case CELP stated that it "petitions the [Commission] to determine the rates and certain conditions of a power purchase agreement..." Petition, Docket No. 91.4.15, April 11, 1991. The body of the petition and the prayer for relief, however, indicate that conditions of the contract and not rates were at issue. The issue was the quantity of energy and capacity covered by the contract rates; the rates themselves were not in dispute. In order No. 5564, • 1, the hearing examiner characterized CELP v. MPC as a "dispute ... over the amount of capacity and energy that MPC is obligated to purchase from the CELP project (project) at contract prices pursuant to the agreement." In resolving the dispute the hearing examiner determined that MPC was obligated to purchase certain capacity and energy "at rates determined in the agreement." The

parties did not challenge Order No. 5564 and it was adopted by the Commission in Order No. 5564a. The Commission finds that, despite MPC's characterization of CELP v. MPC as a proceeding to determine a rate, that case clearly involved the interpretation of certain nonrate terms and conditions of an executed agreement.

11. MPC's interpretation of Sec. 69-3-603(2), MCA, is not entirely clear to the Commission. MPC equates the word "conditions" in Sec. 69-3-603(2), MCA, with "conditions of service," apparently connecting the Commission's authority in that section to the Commission's general authority over utility rates and service set forth, in part, at Sec. 69-3-201, MCA. The implication of this interpretation is that Sec. 69-3-603(2), MCA, gives the Commission jurisdiction over agreements only to the extent that they affect rates or the adequacy (condition) of utility service. See generally *City of Billings v. PSC*, 193 Mont. 358. The Commission does not agree with this interpretation as it is inconsistent with a plain reading of the statute. Section 69-3-603(2), MCA, begins, "The Commission shall determine the rates and conditions of the contract ..." The Commission finds that the word "conditions" means terms and conditions of the contract and is not susceptible to the interpretation suggested by MPC. The Commission further finds that Sec. 69-3-603(2), MCA, gives it the authority beyond any reasonable doubt to interpret the conditions of a contract for the sale of electricity from a qualifying facility to a public utility.

12. MPC cites to *City of Billings v. MPC*, 193 Mont. 358 and *Afton Energy, Inc. v. Idaho Power Co.*, 729 P.2d 400, to support its position that the Commission is without jurisdiction over BGI's petition. In *City of Billings* the court held that the Commission "has authority to modify or supersede a contract between a public utility and its customer [only] if the contract poses an immediate threat to the utility's ability to serve or if the contract adversely affects the utility's rate structure." *Id.* at 372. MPC argues that since the contract at issue affects neither utility service nor rates the Commission has no jurisdiction over the petition.

13. The specific holding in *City of Billings* has no

application to the question of Commission jurisdiction in this case. In *City of Billings* the court found Commission authority over a contract between a public utility and its customers only in cases where the contract poses an immediate threat to utility service and rates. Utility service and rates are recognized areas of Commission authority pursuant to Title 69, Chapter 3, parts 2 and 3, MCA. In this case, however, jurisdiction is found, not in the general Commission authority over rates and service, but in a specific statute that applies to utilities and QFs. The "contract between a public utility and its customer," the subject of the holding in *City of Billings*, is simply not the same kind of contract addressed in Sec. 69-3-603, MCA; therefore, the holding in *City of Billings* does not control the question of jurisdiction in this case.

14. The discussion in *City of Billings* does raise a state constitutional question of Commission jurisdiction in this case. The court notes that "Section 69-3-103(1), MCA, states that the [Commission] does not have judicial powers," and concludes that "Interpretation and enforcement of contracts are judicial functions." *City of Billings* at 369. The Commission recognizes that it is possible to conclude from this that Sec. 69-3-603, MCA, to the extent that it authorizes the Commission to interpret a contract, is unconstitutional as a violation of Article III, Section 1 (separation of powers), Constitution of Montana. See also *Public Service Commission v. District Court*, 107 Mont. 240. The Commission, however, will not address the constitutionality of Sec. 69-3-603, MCA. "Constitutional questions are properly decided by a judicial body, not an administrative official, under the constitutional principle of separation of powers." *Jarusi v. Board of Trustees*, 204 Mont. 131, 136 (1983). The Commission presumes that Sec. 69-3-603, MCA, is constitutional until told otherwise by a proper "judicial body."

15. The Commission finds that *Afton Energy*, 729 P.2d 400, is not proper authority on the question of Commission jurisdiction over this petition. *Afton Energy* may be controlling in Idaho on the question of the Idaho Public Utilities Commission's jurisdiction over contracts similar to this one. However, aside from the obvious point that Idaho case law does

not control this Commission, Idaho does not appear to have a statute similar to Sec. 69-3-603, MCA. Thus, Afton Energy was decided in a legal context significantly different from this case.

CONCLUSION OF LAW

1. The Commission has the jurisdiction to determine conditions of a power purchase agreement for the sale of electricity from a qualifying small power production facility to a public utility. Secs. 69-3-603 - 604, MCA.

ORDER

For the foregoing reasons the Motion to Dismiss of the Montana Power Company is Denied.

Done and Dated this 9th day of September, 1992 by a vote of 4-1.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

DANNY OBERG, Chairman
WALLACE W. "WALLY" MERCER, Vice Chairman
BOB ANDERSON, Commissioner
JOHN B. DRISCOLL, Commissioner
TED C. MACY, Commissioner
(Voting to Dissent)

ATTEST:

Ann Purcell
Acting Commission Secretary

(SEAL)

NOTE: Any interested party may request that the Commission reconsider this decision. A motion to reconsider must be filed within ten (10) days. See 38.2.4806, ARM.